No. 12494

In the United States Court of Appeals for the Ninth Circuit

F. E. LEITNER, ALSO KNOWN AS S. F. LEITNER, ALSO KNOWN AS FREDERICK LEITNER, RAPHAEL PORTA, AND WILLIAM E. BARDEN, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

STATEMENT OF JURISDICTION

The United States of America instituted suit for restitution of rent overcharges and an injunction against the above-named appellants pursuant to Section 206 (a) of the Housing and Rent Act of 1947, as amended (50 U. S. C. App. 1881 et seq., P. L. 31, 81st Cong., 1st Sess.) (R. 2). Jurisdiction of the District Court is conferred by Section 206 (b) and 206 (c) of said Act (R. 2). Jurisdiction of this Court is conferred by Section 1291 of the Judicial Code (28 U. S. C. 1291).

COUNTERSTATEMENT OF FACTS

This suit arises out of an alleged violation of the Housing and Rent Act of 1947 to which defendants

interpose a defense of decontrol under Section 202 (c) (3) (B) of the Housing and Rent Act of 1947, as amended by the Housing and Rent Act of 1948 (50 U. S. C. App. 1892) which reads as follows:

> The term "controlled housing accommodations" * * * does not include—
>
> (3) any housing accommodations * * * (B) which for any successive twenty-four month period during the period February 1, 1945, to the date of enactment of the Housing and Rent Act of 1948, both dates inclusive, were not rented (other than to members of the immediate family of the landlord) as housing accommodations; or[1]

From March 12, 1942 through July 12, 1947, Apartment 1760–A Filbert Street, San Francisco, California was occupied by Emmanuel G. Leres who paid no money rent but received the right to occupy it as compensation for services rendered to the owner (R. 43). Appellants contend that such occupancy is not a rental. Appellee contends that it is a rental. Both parties agree that if the apartment was rented, there has been no decontrol since this occupancy covered 30 of the 38 months included in Section 202 (c) (3) (B). If the apartment was not rented, both parties agree that it was decontrolled at the time the actions here complained of took place even though it may subsequently have been recontrolled under the amendments to the Housing and Rent Act of 1947,

[1] The effective date was March 30, 1948. The section was again amended by the Housing and Rent Act of 1949 (P. L. 31, 81st Cong., 1st Sess.) to eliminate the exemption from control relied on by defendant.

effected by the Housing and Rent Act of 1949 (P. L. 31, 81st Cong., 1st Sess.).

After Leres ceased to occupy the apartment it was rented to Mr. and Mrs. Merald B. Hawkins from January 1, 1948, to April 1, 1949 at the rate of $65 per month. The maximum legal rent as established by order dated February 21, 1949 and made retroactive to July 1, 1947 was $25 per month (R. 29), and if there were any unlawful overcharges they amounted to $600 (R. 49). The housing accommodation, if decontrolled, again became subject to rent control on April 1, 1949, when subsection (3) (B) of Section 204 (c) was deleted from the Housing and Rent Act of 1947 by Section 201 (c) of the 1949 Act. This suit deals only with overcharges prior to April 1, 1949.

SUMMARY

Although appellants designated three points on appeal, they have abandoned two and rely only on the contention that the Court was in error in granting a motion for summary judgment on the admitted facts. Appellee contends that the action of the Court below was proper because a housing accommodation is rented under the Housing and Rent Act of 1947 and the regulations issued pursuant thereto when occupied by an employee as compensation for services. The definition of rent in the Housing and Rent Act of 1947 is the same as that included in all rent control regulations and differs from that in the Emergency Price Control Act only by being more complete. Congress approved the broader language

contained in the regulation issued under the 1942 Act by incorporating it in the 1947 Act.

The services performed by the manager were rent since they were a benefit to the landlord. Rent is not necessarily money. The fact that the apartment was exempt from control by administrative regulation does not alter the fact that it was rented under the Act. The regulations exempted a number of types of rented accommodations. The 1947 Act decontrols certain specified accommodations not rented but these decontrol provisions do not apply to accommodations rented but exempt from control under previous regulations.

The correctness of this position is evidenced by an official interpretation of the Housing Expediter which should control unless plainly erroneous or inconsistent with the Act. Two District Court cases sustain this position. The cases cited by appellants are either inapplicable or wrongly decided. They ignore the fact that the meaning and application of a federal statute are governed by federal, not local law. The judgment below should be affirmed.

ARGUMENT

I

The points on appeal designated by appellants, but not argued in their brief, should be treated as abandoned

Appellants have specified three points on which they intended to rely on appeal, namely:

1. The motion for summary judgment was improper because there was a genuine issue of material fact.

2. The record shows that the premises involved were decontrolled because they were not rented from February 1, 1945 to March 30, 1948, both dates inclusive.

3. The interrogatories proposed by defendants and ordered stricken by the Court were properly directable to issues of material facts in the case.

The appellants' brief is directed solely to a slightly modified version of their second point, namely, that the premises were decontrolled because they were not rented for twenty-four consecutive months, between February 1, 1945 and March 30, 1948, the actual period in controversy being the period of occupancy of Emmanuel G. Leres extending from February 1, 1945, to July 1, 1947, or a period of 30 months.

Since the other two points have not been included or argued in appellants' brief as required by Rule 20 (f) of the Rules of this Court, they should be treated as having been abandoned.

Martin v. *Sheely,* 144 F. 2d 754, 756 (C. A. 9).

Stetson v. *United States,* 155 F. 2d 359, 361 (C. A. 9).

Western National Ins. Co. v. *LeClare,* 163 F. 2d 337, 340 (C. A. 9).

II

The Court below correctly concluded that the apartment at 1760–A Filbert Street, San Francisco, California, was rented for thirty of the thirty-eight months included in the period from February 1, 1945, to March 30, 1948, both dates inclusive, and was therefore subject to rent control.

Appellee agrees with appellants that on a motion for summary judgment the facts stated in appellants'

affidavit in opposition to the motion must be taken as true. Appellee further agrees that Emmanuel G. Leres must be regarded as having been permitted to occupy the apartment at 1760–A Filbert Street as compensation for his services. However, appellee does not agree that such occupancy by Leres as compensation was not also a renting to Leres under the definition of "rent" in the applicable acts and regulations. Under the definition of rent contained in the Housing and Rent Act of 1947, as amended, the occupancy is a rental even though it is also compensation. The two are not mutually exclusive.

The definition of rent which is contained in Section 202 (e) of the Housing and Rent Act of 1947 is as follows:

> SEC. 202 (e) The term "rent" means the consideration, including any bonus, benefit or gratuity demanded or received for or in connection with the use or occupancy of housing accommodations, or the transfer of a lease of housing accommodations.

The same definition has been included in the various rent control regulations since they were first issued under the Emergency Price Control Act of 1942 except that the words "in connection with" were added in September of 1944 (See Section 13 (10) of Rent Reguation for Housing (9 F. R. 10633)), obviously to conform more closely to the definition of rent contained in the Emergency Price Control Act of 1947 which is as follows:

> SEC. 302 (b) The term "rent" means the consideration demanded or received in con-

nection with the use or occupancy or the transfer of a lease of any housing accommodations (50 U. S. C. App. 942 (g)).

The definitions of rent in Section 202 (e) of the Housing and Rent Act of 1947 and in Section 13 (10) of the Rent Regulation for Housing (9 F. R. 11335) differ from the definition in the Emergency Price Control Act of 1942 only in that they spell out certain types of consideration included but not specified in that act. The fact that Congress later adopted the language of the regulation clearly demonstrates its approval of that language (Cf. *Woods* v. *Petchell,* 175 F. 2d 202, 208 (C. A. 8); *Helvering* v. *Winmill,* 305 U. S. 79, 83; *Boehm* v. *Commissioner,* 326 U. S. 287, 292; *United Labor Committee* v. *Woods,* 175 F. 2d 967, 969; *Woods* v. *Oak Park Chateau Corporation,* 179 F. 2d 611, 613).

The question then becomes: Did the owner of the house in which 1760–A Filbert Street was located receive a consideration including a "bonus, benefit, or gratuity" from Emmanuel Leres in return for Leres' occupation of the housing accommodation? The answer, of course, is that he received the services Leres performed as janitor. Leres' services were a benefit to him and the consideration which Leres gave in lieu of money.

"Rent may consist of something besides money and may be payable in the form of labor." OPA Interpretation 4–V–4 issued December 2, 1942; revised, July 1, 1945—Rent Regulation for Housing, p. 29 issued July 1, 1945.

Accordingly, under the Act, Leres paid rent and the fact that he did not pay it in money does not make his occupancy any the less a rental.

This is true even though, as is the case here, the rented accommodation was previously exempt from rent control. The Rent Regulation for Housing (9 F. R. 11335) and the Controlled Housing Rent Regulation (14 F. R. 5711) exempt certain categories of rented housing from control, as the Price Administrator was authorized to do by the Emergency Price Control Act. These, as listed in Section 1 (b) included accommodations occupied by farming tenants working on the farm where the housing was located, and by service employees such as Leres, to whom space was provided as part or all of his compensation; accommodations otherwise controlled; entire structures of more than 25 rooms rented together; accommodations rented to the United States acting by the National Housing Agency, and certain resort housing. Such an exemption did not mean that the accommodations were not rented but merely that, for administrative reasons, they were not subject to control under the Rent Regulation for Housing.

When the Housing and Rent Act of 1947 became effective it decontrolled certain categories of housing accommodations including housing which was not *rented* (other than to the immediate family of the landlord) [2] for any successive twenty-four month period between February 1, 1945 and March 30, 1948,

[2] This word was originally "occupant" but was changed to landlord in 1948.

both dates inclusive.[3] However, the word used was "rented" and not "controlled". For this reason the Office of the Housing Expediter took the position that housing previously exempt was subject to rent control when the exempt usage terminated.

This is the position consistently taken by the Office of the Housing Expediter and set forth in an official interpretation issued on August 25, 1948 and published in the Federal Register on October 2, 1948 (13 F. R. 5706, 5787). This interpretation is as follows:

> 9. *Housing accommodations which were exempt from rent control during two-year period.* Where during the two-year period housing accommodations were rented under circumstances which caused the renting to be exempt from the rent regulations, the mere fact that such an exemption existed does not result in decontrol. For example, where housing accommodations were occupied during the two-year period by a janitor as part of the compensation he received for his services as janitor, the housing accommodations, so long as this situation existed, were exempt from the rent regulations. If, however, after expiration of the two-year period, the housing accommodations are no longer occupied by a janitor under such an arrangement, but are rented to a tenant under an ordinary rental agreement, the exemption ceases to apply, and the question arises whether they are decontrolled on the basis that they had not been "rented" during

[3] These dates are the ones established by the 1948 Act and were in effect when suit was brought.

the two-year period. Such housing accommodations are not decontrolled on that basis because, even though they were exempt during the two-year period, they were rented during that period to a person who was not a member of the landlord's immediate family.

Another example of the same principle is the following: A college dormitory was occupied by students during the two-year period under circumstances which made rooms exempt from rent control. After the two-year period, the college proposes to rent the rooms in the structure to professors or other persons on an ordinary landlord-tenant basis. Such a renting would be subject to rent control because, although the rooms in the dormitory were exempt during the two-year period, they were in fact rented to persons other than members of the landlord's immediate family.

Official interpretations of a regulation are entitled to controlling weight unless plainly erroneous or inconsistent with the Act. See *Bowles* v. *Seminole Rock & Sand Co.,* 325 U. S. 410, 413, where the Court said:

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of control-

> ing weight unless it is plainly erroneous or inconsistent with the regulation.

See also, *Porter* v. *Crawford & Doherty Foundry Co.,* 154 F. 2d 431, 433 (C. A. 9), cert. den. 329 U. S. 720, in which this Court in applying OPA interpretations of its own regulations said:

> Since such administrative construction is not irrational, its interpretations are binding upon the courts.

See, too, *Woods* v. *Macken,* 178 F. 2d 511 (C. A. 4th).

The fact that the language of the regulation has been incorporated into the Housing and Rent Act of 1947 does not appear to us to detract from the force of this principle. However, if the Expediter had been interpreting the language of a statute which was not also the language of a regulation issued before and continuing in effect after the passage of the Act, the interpretation would still be entitled to great weight. (See *Woods* v. *Petchell, supra,* and *Woods* v. *Oak Park Chateau Corporation, supra*).

That this interpretation is not irrational is demonstrated by Judge Weinberger's opinion in *Woods* v. *Lansdowne,* 86 F. Supp. 811 (S. D. Cal., C. D.) and Judge Erskine's opinion in this case both of which, after careful consideration, determine that apartments occupied by an employee of the owner as all or part of his compensation have been rented under the Housing and Rent Act of 1947, as amended. There have as yet been no appellate court decisions on this point since the amendment is of comparatively recent origin.

Appellants cite the cases of *Schumann* v. *California Cotton Credit Corp.,* 105 Cal. App. 136, 141; *Maio* v. *Borrell,* 83 N. Y. S. (2d) 532; *Adcock* v. *Smith,* 37 S. W. 91 and *Prince* v. *Davis,* 87 N. Y. S. (2d) 600, 602.

Schumann v. *California Cotton Credit Corp.* and *Adcock* v. *Smith* are apparently cited merely to establish that Leres' occupancy of the apartment constituted his "wages," a point with which we do not quarrel.

The two New York cases cited are lower state court opinions in connection with summary dispossess proceedings—one in the City Court of Mt. Vernon and one in that of New Rochelle. In *Maio* v. *Borrell,* the distinction between the right of a subsequent purchaser to dispossess the former superintendent and the question of whether the apartment he occupied had been rented was clearly drawn. The Court held that for eviction purposes under local law, the new owner was not the landlord of the superintendent.

In *Prince* v. *Davis,* 87 N. Y. Supp. 2d 600, the Court determined that the relationship of employer-employee and that of landlord and tenant could not co-exist under local law, and that since the apartment had been occupied by an employee it could not have been rented.

Neither of these cases takes into consideration the opinion of the Court of Appeals for the Second Circuit in the case of *Fleming* v. *Chapman,* 161 F. 2d 345, in which Judge Clark held a divorced wife to be the tenant of her husband under the New York Rent Control Regulations which contained the same defini-

tion of rent as that here under consideration. The Court said:

> * * * The applicable Rent Regulations for the New York City Defense Rental Area, 8 F. R. 13914, are quite inclusive, and do not rest merely on some formal consensual arrangement of leasing. Compare *Pfalzgraf* v. *Voso,* 184 Misc. 575, 55 N. Y. S. 2d 171, 173; *Da Costa* v. *Hamilton Republican Club of Fifteenth Assembly Dist.,* 187 Misc. 865, 65 N. Y. S. 2d 500, 503. Thus they define a "landlord" to include a "person receiving or entitled to receive rent for the use or occupancy of any housing accommodations," a "tenant" to include a "person entitled to the possession or to the use or occupancy" of such accommodations, and "rent" to include any "benefit * * * received for or in connection with the use or occupancy of housing accommodations." Id. § 13 (a) (8) (9) (10). Here defendant's own acts made it indisputable that the transactions came within these broad definitions. * * *

In so holding, the Court of Appeals was applying the recognized rule that where a federal statute prescribes a universal rule its application is not dependent on local law. The federal rule established by the Housing and Rent Act applies universally. *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111; *Woods* v. *Petchell,* 175 F. 2d 202 (C. A. 8); *Woods* v. *Krizan,* 176 F. 2d 667 (C. A. 8); and *Case* v. *Bowles,* 327 U. S. 92 affirming 149 F. 2d 777 (C. A. 9). In addition to *Fleming* v. *Chapman, supra,* there is *Fleming* v. *Simms,* 164 F. 2d 153 (C. A. 5) where the Court distinguished between the

use of the terms "landord" and "tenant" under the common law and under the Rent Control legislation and applied the broader definitions of the latter legislation. The Court below was clearly justified in applying the broad statutory definition of rent in the manner in which it did in order to achieve more fully the salutary purposes of the Act.

CONCLUSION

It is respectfully submitted that the judgment of the Court below should be affirmed since on the admitted facts Emmanuel G. Leres was permitted to occupy Apartment 1760–A in return for his services as manager which services constituted the rent paid for the apartment. Since the apartment was rented during the statutory period it was not decontrolled under the provisions of the Housing and Rent Act of 1947 and, therefore, the judgment should be affirmed.

Respectfully submitted.

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